K & 4R, Inc., d/b/a New Athens IGA *and* United Food and Commercial Workers International Union, AFL–CIO, CLC, Local No. 881. Case 14–CA–22470

February 9, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

Upon a charge and amended charge filed by United Food and Commercial Workers International Union, AFL–CIO, CLC, Local No. 881, the Union, the General Counsel of the National Labor Relations Board issued a complaint on June 29, 1993, and an amendment to complaint on August 23, 1993, against K & 4R, Inc., d/b/a New Athens IGA, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.[1] The Respondent filed an answer to the complaint and to the amendment to complaint. Thereafter, on September 3, 1993, the Respondent withdrew its answers.

On January 10, 1994, the Acting General Counsel filed a Motion for Summary Judgment with the Board. On January 12, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Although the Respondent initially filed answers, the undisputed allegations in the Motion for Summary Judgment disclose that the Respondent withdrew its answers on September 3, 1993. Such a withdrawal has the same effect as a failure to file an answer, i.e., the allegations in the complaint, as amended, must be considered to be admitted to be true. See *Maislin Transport*, 274 NLRB 529 (1985).

In the absence of good cause being shown for the failure to file a timely answer, we grant the Acting General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Missouri corporation, has been engaged in the retail sale of grocery products at a retail store located in New Athens, Illinois. During the 12-month period ending May 31, 1993, the Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 directly from points outside the State of Illinois. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed at the Respondent's New Athens, Illinois store, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act and all meat department employees.

Since at least 1991, the Union has been the designated exclusive collective-bargaining representative of the unit employees and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective November 17, 1991, through November 21, 1992, and extended pursuant to an extension agreement dated November 20, 1992. At all times since at least 1991, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit employees.

On about April 24, 1993, the Respondent closed the New Athens, Illinois store and discharged all of its employees. This matter relates to wages, hours, and other terms and conditions of employment of the unit employees and is a mandatory subject for the purposes of collective bargaining. The Respondent engaged in this action without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees with respect to the effects of such action.

[1] Also named as successor Respondents in the complaint and amendment to complaint were Klingenberg Foods, Inc. and Ralph J. Groth, an individual. On September 3, 1993, Respondents Groth and Klingenberg executed a settlement agreement and notice to employees which was approved by the Acting Regional Director on September 7, 1993. Pursuant to the settlement agreement, allegations against Respondents Groth and Klingenberg were remedied. The complaint was withdrawn against these Respondents and they withdrew their answers. The settlement agreement contained a reservations clause which specified that it did not cover or settle allegations against Respondent New Athens IGA. On September 10, 1993, the Acting Regional Director approved Respondent New Athens IGA's request to withdraw its answer, severed the allegations against Respondents Groth and Klingenberg, and postponed the hearing indefinitely.

Since about November 10, 1992, the Respondent has failed and refused to continue in effect all terms and conditions of the collective-bargaining agreement by failing and refusing to pay required contributions to the union pension and trust funds and health and welfare funds pursuant to articles 15 and 16 and by failing and refusing to provide employees with vacation pay and holiday pay pursuant to articles 10 and 11. The Respondent engaged in this conduct without the Union's consent. These matters are mandatory subjects for the purpose of collective bargaining.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has violated Section 8(a)(1) and (5), and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(d) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to close its facility, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of closing its facility on its employees, and shall accompany our Order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent pay backpay to the terminated employees in a manner similar to that required in *Transmarine Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In view of the fact that the Respondent's facility is currently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

In addition, having found that the Respondent has violated Section 8(a)(1) and (5) by failing to make contractually required contributions to the union pension and trust funds and health and welfare funds pursuant to articles 15 and 16, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, having found that the Respondent violated Section 8(a)(1) and (5) by failing and refusing to provide unit employees with vacation pay and holiday pay pursuant to articles 10 and 11, we shall order the Respondent to make the unit employees whole for all losses attributable to this unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, K & 4R, Inc., d/b/a New Athens IGA, New Athens, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with United Food and Commercial Workers International Union, AFL–CIO, CLC, Local No. 881 regarding the wages, hours, and terms and conditions of employment of employees in the following appropriate unit by closing its store and discharging all employees without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of its employees. The unit is as follows:

> All employees employed at the Respondent's New Athens, Illinois store, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act and all meat department employees.

(b) Failing and refusing to pay required contributions to the union pension and trust funds and health and welfare funds pursuant to articles 15 and 16 of the contract.

(c) Failing and refusing to provide employees with vacation pay and holiday pay pursuant to articles 10 and 11 of the contract.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union on behalf of its unit employees with respect to the effects on those employees of its decision to close the New Athens, Illinois store and its discharge of them and, if an understanding is reached, embody it in a signed document.

(b) Pay the unit employees who were terminated their normal wages for the appropriate period as set forth in the remedy section of this decision.

(c) Make whole its unit employees and relevant funds, with interest, where applicable, for its failure to pay required contributions to the union pension and trust funds and health and welfare funds pursuant to articles 15 and 16 of the contract and for its failure to provide unit employees with vacation pay and holiday pay pursuant to articles 10 and 11 of the contract, in the manner set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Mail to the Union and its unit employees, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. February 9, 1994

James M. Stephens, Chairman

Dennis M. Devaney, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES MAILED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to bargain in good faith with United Food and Commercial Workers International Union, AFL–CIO, CLC, Local No. 881 on behalf of our employees in the following appropriate unit by failing to give timely notice to the Union of our decision to close the New Athens, Illinois store and discharge all employees. The unit is as follows:

> All employees employed at our New Athens, Illinois store, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act and all meat department employees.

WE WILL NOT fail and refuse to pay required contributions to the union pension and trust funds and health and welfare funds pursuant to articles 15 and 16

of our contract and WE WILL NOT fail and refuse to provide employees with vacation pay and holiday pay pursuant to articles 10 and 11 of the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union with respect to the effects of the closing of the New Athens, Illinois store and the discharge of the unit employees and WE WILL pay our employees backpay as described in the decision of NLRB, with interest.

WE WILL honor the terms of our collective-bargaining agreement with the Union and make whole unit employees and funds, with interest, where applicable, for our failure to adhere to the terms of that agreement relating to required contributions to the union pension and trust funds and health and welfare funds pursuant to articles 15 and 16 of the contract and vacation pay and holiday pay pursuant to articles 10 and 11 of the contract.

K & 4R, INC., D/B/A NEW ATHENS IGA